Ahmad Thaqif Amzar bin Ahmad Huzairi (claiming through his mother and legal representative, Majdah bt Mohd Yusof) v Kuala Terengganu Specialist Hospital Sdn Bhd & Ors

HIGH COURT (KUALA TERENGGANU) — CIVIL SUIT NO TA-22NCVC-33–09 OF 2018
ABDUL WAHAB J
30 AUGUST 2020

Tort — Negligence — Medical negligence — Plaintiff (minor) sued hospital and doctors for negligence for causing him irreversible brain damage — Damage caused by deprivation of oxygen to brain owing to growth in neck which grew larger by the day and cut off the airway — Whether plaintiff, suing through mother, had proven on balance of probabilities that doctors who attended to him failed to appreciate seriousness of his condition and the need for urgent treatment — Whether despite overwhelming negligence of the doctors plaintiff's parents were substantially liable in contributory negligence for delaying seeking medical attention for plaintiff — Whether negligence of doctors concerned caused their employers (government and the private hospital) to be vicariously liable

The plaintiff, through his mother and legal representative, sued the defendants for damages for causing him irreversible brain damage due to their failure to give him prompt and effective treatment when he sought their help for a medical condition. On 30 August 2011, the plaintiff's parents took him to the first defendant hospital ('KTSH') because he had a fever and a swelling in the neck. The second defendant ('D2') attended to the plaintiff, prescribed him some oral syrup medicine and told the parents to bring the plaintiff back if the swelling failed to subside. Two days later, the parents took the plaintiff back to KTSH where D2 found that the swelling had become bigger. He recommended that the plaintiff be admitted to be seen by the pediatrician/ear-nose-throat ('ENT') specialist but for financial reasons the parents decided not to admit and took the plaintiff home. A few days later, the plaintiff's mother, who was a civil servant, took the plaintiff to a private clinic where the doctor advised that the boy be taken to a government hospital ('HSNZ') immediately for treatment. On the night of 5 September 2011, the parents took the plaintiff to HSNZ where, over the next 12 hours or so, he was seen by various house doctors, namely the fourth, fifth and sixth defendants, who either monitored his medication or sent him for an x-ray of the neck swelling. It was only about noon on 6 September 2011, that the plaintiff was finally seen by a specialist (the seventh defendant) and another doctor (the ninth defendant). They performed a bedside ultrasound examination and planned to send him to the ENT department. About an hour later, the

plaintiff's condition grew worse — he had a low respiratory rate, a very fast pulse and a high fever. An hour later, a medical officer from the ENT department (the tenth defendant) examined the plaintiff and found the swelling in the neck had become inflamed, warm and very tender and that the plaintiff's breathing was noisy. The doctor ordered an emergency CT scan of the neck but it was never done. About 3pm, two anaesthetists (the 11th and 12th defendants) saw the plaintiff and a decision was taken to send him to the operating theatre for intubation. However, on the way there, the plaintiff began gasping for breath and collapsed. He was revived, ventilated and moved to the intensive care unit. Around 6.30pm, a CT scan was done and it revealed that the plaintiff had a huge left neck abscess which was obstructing his airway. Three hours later, the plaintiff underwent surgery on the neck abscess after which he was placed on a ventilator and he remained in hospital for a month before he was discharged. The growth in the plaintiff's neck had blocked off the airway and deprived his brain of oxygen (he had suffered hypoxic ischemic encephalopathy) causing him irreversible brain damage. The plaintiff could no longer take care of himself and he became fully dependent on others for all activities of daily living. He could not eat, sit, walk or stand unaided, respond physically, speak coherently, see clearly or attend school. In his instant suit for general, special and aggravated damages and damages for his future care and sustenance, the plaintiff claimed that the brain damage he suffered was due to the negligence of all the defendants. He said D2 failed to properly investigate and treat his condition at the outset and also failed to advise his parents about the seriousness of his condition and the risks involved if it was not treated urgently. The plaintiff said D2's medical notes were scanty and failed to properly record his condition. Whether it was at KTSH or at HSNZ, there was inordinate delay in having a specialist attend to him and in having a CT scan done. He said his case required multi-disciplinary specialist attention but he never received the same. Owing to the negligence of the doctors concerned, the plaintiff said both the first and third defendants were vicariously liable for the negligence of their servants and/or agents. In their defence, the defendants asserted that, inter alia: (a) there was no negligence on their part as the plaintiff was accorded reasonable standard of care and treatment; (b) the initial treatment and medication that was given to the plaintiff was correct as the plaintiff was then in a stable condition and did not display any signs of acute upper airway obstruction; (c) the plaintiff's parents were entirely to be blamed for delaying medical treatment to the plaintiff for they not only failed to heed D2's advice to admit the plaintiff but also failed to take the boy to HSNZ without delay; and (d) the damages claimed by the plaintiff was exorbitant and unreasonable and there was no reason for him to claim private hospital charges when he could have obtained the same treatment for free at the government hospital, given that the plaintiff's mother was a civil servant. The defendants took issue over the amounts claimed by the plaintiff under various heads of damages.

Held, allowing the plaintiff's claim and apportioning liability as follows: the first and second defendants 15% liable, the third to the 12th defendants (excluding the eighth defendant) 55% liable and the plaintiff's parents 30% liable. Damages were ordered to be paid to the plaintiff with interest thereon as per para (6) hereunder:

(1) On the evidence, the plaintiff had proven his case on balance of probabilities. However, the total sum awarded to the plaintiff was subject to a 30% reduction for contributory negligence on the part of the plaintiff's parents (see paras 155–156).

(2) The second defendant ('SD2') had breached his duty of care to the plaintiff in failing to advise and/or to issue a referral letter to the plaintiff's parents to take the plaintiff to HSNZ soonest, if not immediately, from the date of the plaintiff's second visit to KTSH. There was nothing in SD2's medical report to show that he had explained the seriousness of the plaintiff's condition to his parents or of the fact that he had advised the plaintiff to be taken to HSNZ promptly. There was also no record that the plaintiff's parents had refused to take the boy to HSNZ. SD2's medical report also did not record the size of the neck swelling despite his noting, on the plaintiff's second visit, that the size had increased. SD2 had failed to demonstrate any urgency to subject the plaintiff to further examination. This resulted in the aggravation of the plaintiff's condition causing him to suffer the permanent disability (see paras 83–84, 86–87 & 89).

(3) Despite the seriousness of the plaintiff's condition, as admitted by the third to the 12th defendants, the plaintiff was only attended to by a specialist almost 14 hours after he first arrived at the A & E Department of HSNZ at about 10pm. Neither the fourth nor the sixth defendant who attended to the plaintiff referred the matter to a specialist on call with promptitude. The plaintiff was at high risk and should have been referred to a specialist without delay. It was in evidence that the ultrasound and x-ray examinations carried out by the defendants were unnecessary and that an early CT scan should have been done. Although it was planned to be done as early as 9.54am, as evident from the hospital's progress note, the CT scan was only done about two hours after the plaintiff had collapsed. It was evident that the defendants had breached their duty of care by failing to act with urgency to ensure that the plaintiff's airway was not blocked, for this was what ultimately caused the permanent brain damage to the plaintiff. In the whole episode, the eighth defendant was not liable because he was never present (see paras 92–94 & 96–98).

(4) As SD2 was an employee of the first defendant, the latter was vicariously liable for SD2's negligence. Similarly, and pursuant to s 5 of the Government Proceedings Act 1956, the third defendant was vicariously liable for the negligence of the other defendants who were its employees.

The system failure at HSNZ at the material time which delayed the securing of the plaintiff's airway promptly also made the third defendant directly liable to the plaintiff for such failure. The first and third defendants further owed a non-delegable duty to the plaintiff to ensure that their doctors/consultants had the necessary qualifications skill and competence in carrying out their tasks in treating the plaintiff (see paras 103–107).

(5) The tardiness on the part of the plaintiff's parents in taking him to HSNZ was unreasonable, given that the plaintiff had a persistent fever and the swelling on his neck was increasing in size. The issue of financial constraint raised by the plaintiff had no merit and was a mere excuse as the plaintiff's mother was a civil servant and was well aware of her and her child's entitlement to free medical treatment at the HSNZ. For those reasons, the plaintiff's parents were liable for contributory negligence. Liability was therefore apportioned at 15% to the first and second defendants, 55% to the third to 12th defendants (except the eighth defendant) and 30% to the plaintiff's parents (see paras 110–111).

(6) The following awards of damages were made in respect of the seven years between 2011 and the date the plaintiff filed his claim in 2018. Future damages were based on the plaintiff's life expectancy of 33 years using a multiplier of 16 (see paras 30 & 142):

(a) one-third of the proven RM1,945.25 for hospital and medical expenses (no reason was shown that it was justified and reasonable for the plaintiff to be awarded the full sum he had incurred at the private hospital as the government hospital was capable of dealing with cerebral palsy patients. Also the contention that the plaintiff's parents could not take him to the government hospital during office hours due to work commitments was an unreasonable excuse) (see paras 121–122);

(b) RM12,750 for travelling expenses (no basis was shown for the plaintiff's claim of RM23,205 for travelling expenses at the rate of RM273 per month) (see paras 123–124);

(c) RM340 for medical reports and RM300 for the pre-action discovery expenses to obtain the medical records from the third defendant (see paras 125–127);

(d) RM102,900 for cost of caregiver/maid (see paras 129–131);

(e) RM18,133 for cost of physiotherapy (see para 132);

(f) RM9,141 for supporting equipment (see para 133);

(g) RM35,000 for cost of personal care items (see para 134);

(h) RM40,635 for special food and RM2,268.35 for medicinal oils (see paras 135–136);

(i) RM350,000 for pain and suffering and loss of amenities of life (see para 140);

(j) RM35,000 for future surgery to spine and hip (see para 145);

(k) RM848,900 for future cost of equipment, appliances, etc (see para 143);

(l) RM384,000 for hiring of a maid (at RM2,000 per month) (see para 147);

(m) RM100,000 for aggravated damages (because of third defendant's suppression of plaintiff's medical records causing plaintiff to incur time and expense to file pre-action discovery to obtain the records and also because of refusal of defendants to admit liability despite overwhelming evidence of their negligence thereby causing unnecessary distress to plaintiff and his parents) (see paras 151–153); and

(n) interest at 4%pa on special damages from 5 September 2011 until date of judgment; interest at 8%pa on both pre-trial damages and general damages from date of service of writ to date of judgment, and interest at 5%pa on the total judgment sum from date of judgment until date of full payment (see para 154).

[Bahasa Malaysia summary

Plaintif melalui ibunya dan wakil di sisi undang-undang, telah menyaman defendan kerana mengakibatkan dirinya mengalami kerosakan otak yang tidak boleh dipulihkan atas sebab kegagalan mereka untuk memberinya rawatan yang cepat dan berkesan apabila dia cuba untuk mendapatkan bantuannya untuk satu keadaan kesihatan. Pada 30 Ogos 2011, ibu bapa plaintif mebawanya kepada hospital defendan pertama (KTSH) kerana dia demam dan mempunyai bengkak di lehernya. Defendan kedua (D2) telah menguruskan plaintif dan memberikannya ubat cecair oral dan memberitahu ibu bapanya untuk membawa plaintif kembali sekiranya bengkak tersebut tidak surut. Dua hari kemudian, ibu bapa plaintif membawa plaintif kembali ke KTSH di mana D2 mendapati bahawa bengkak tersebut makin membersar. Dia mengesyorkan kepada plaintif untuk di masukkan ke hospital untuk diperiksa oleh seorang doktor pakar pediatrik/telinga-hidung-tekak (ENT) akan tetapi atas sebab kewangan ibu bapanya mengambil keputusan untuk tidak memasukkan ke hospital dan membawa plaintif pulang ke rumah. Beberapa hari kemudian, ibu plaintif, yang merupakan seorang pegawai kerajaan, membawa plaintif ke klinik swasta yang mana doktor tersebut menasihati agar kanak-kanak tersebut dibawah ke satu hospital kerajaan (HSNZ) dengan kadar segara untuk rawatan. Pada malam 5 September 2011, ibu bapa plaintif membawa plaintif ke HSNZ di mana, untuk tempoh 12 jam selepas dari itu, dia telah diperiksa oleh berbagai pegawai perubatan, iaitu defendan keempat, kelima dan keenam, yang sama ada memerhatikan ubat yang diberikan atau menghantarnya untuk pemeriksaan x-ray untuk bengkak

di lehar tersebut. Ianya hanya pada waktu tengahari pada 6 September 2011, apabila plaintif telah diperiksa oleh seorang pakar (defendan ketujuh) dan seorang doktor yang lain (defendan kesembilan). Mereka telah menjalankan satu pemeriksaan ultrasound di tepi kati dan merancang untuk menghantarnya ke jabatan ENT. Sejam kemudian, keadaan plaintif semakin teruk — dia mempunyai kadar pernafasan yang rendah, denyutan jantung yang laju dan demam yang tinggi. Sejam kemudian, seorang pegawai perubatan daripada jabatan ENT (defendan kesepuluh) telah memeriksa plaintif dan mendapati bahawa bengkak di bahagian leher telah radang, suam dan sakit dan pernafasan plaintif bising. Doktor tersebut memohon satu CT Scan kecemasan untuk bahagian leher namun ianya tidak pernah dibuat. Lebih kurang 3 petang, dua pakar bius (defendan ke-11 dan ke-12) telah memeriksa plaintif dan satu keputusan telah dibuat untuk menghantarnya ke pusat pembedahan untuk intubation. Namun dalam perjalanan ke sana, plaintif menjadi semput dan telah jatuh. Dia telah dihidupkan semula, diudarakan dan dipindahkan ke unit kawalan rapi (ICU). Lebih kurang 6.30 petang, satu CT scan telah dilakukan dan ianya menunjukan bahawa plaintif mempunyai satu *abscess* besar yang menghalang laluan pernafasannya. Tiga jam kemudian, plaintif telah melalui pembedahan pada *abscess* lehernya selepas mana dia telah diberikan alat bantuan pernafasan dan kekal di hospital untuk tempoh satu bulan sebelum plaintif di discaj. Pembesaran di leher plaintif telah menghalang laluan udara tersebut dan menghalang otaknya daripada menerima oksigen (dia telah mengalami hypoxis ischemic encephalophaty) yang menyebabkan kerosakkan otak yang tidak boleh dipulihkan. Plaintif tidak lagi boleh menjaga dirinya dan dia kini bergantung sepenuhnya kepada orang lain untuk semua aktiviti seharian. Dia tidak boleh makan, duduk, berjalan atau berdiri tanpa dibantu, memberi respon secara fizikal, bercakap secara jelas, melihat dengan jelas atau menghadiri sekolah. Dalam guaman ini untuk ganti rugi am, khas dan teruk untuk penjagaan masa depan dan kehidupannya, plaintif menyatakan bahawa kerosakan otak yang dia alami adalah disebabkan kecuaian kesemua defendan. Dia menyatakan bahawa D2 gagal untuk menyiasat dengan betul dan merawat keadaannya pada peringkat awal dan gagal untuk menasihati ibu bapanya mengenai keseriusan keadaannya dan semua risiko yang berkaitan sekiranya tidak dirawat dengan kadar segera. Plaintif juga menyatakan bahawa nota perubatan D2 adalah terlalu sedikit dan gagal untuk merekodkan keadaannya secara tepat. Sama ada ianya merupakan di KTSH atau di HSNZ, wujud kelewatan untuk seorang pakar untuk memeriksanya dan menjalankan CT scan. Dia menyatakan bahawa kesnya memerlukan perhatian seorang pakar pelbagai disiplin akan tetapi dia tidak pernah menerimanya. Atas sebab kecuaian doktor yang terlibat, plaintif menyatakan kedua-dua defendan pertama dan ketiga adalah bertanggungan secara vikarious untuk kecuaian pekerja atau agennya. Sebagai pembelaan mereka, defendan menyatakan, antara lain: (a) tiada kecuaian pada pihak mereka kerana plaintif telah memberikan taraf penjagaan dan rawatan yang munasabah; (b) rawatan dan ubat yang diberikan kepada plaintif adalah betul dan plaintif pada waktu itu

berada dalam keadaan stabil dan tidak menunjukan apa-apa tanda halangan saluran pernafasan bahagian yang makin teruk; (c) ibu bapa plaintif harus dipersalahkan kerana melewatkan rawatan perubatan keapda plaintif kerana mereka gagal untuk mendengar nasihat D2 untuk memasukkan plaintif ke hospital dan gagal untuk membawa anaknya ke HSNZ tanpa sebarang penangguhan; dan (d) kerugian yang dituntut oleh plaintif adalah melampau dan tidak munasabah dan tiada sebab untuknya menuntut caj hospital swasta apabila dia boleh mendapatkan rawatan yang sama secara percuma di hospital kerajaan atas sebab ibunya merupakan seorang penjawat awam. Defendan mengambil isu terhadap jumlah yang dituntut oleh plaintif dibawah beberapa kepala tuntutan.

Diputuskan, membenarkan tuntutan plaintif dan mebahagikan liabiliti secara berikut: defendan pertama dan kedua 15% bertanggungan defendan ketiga hingga ke-12 (tanpa defendan ke 8) 55% bertanggungan dan ibu bapa plaintif 30% bertanggungan. Ganti rugi diperintahkan untuk dibayar keapda plaintif dengan faedah daripadanya sepertinya perenggan 6 dibawah:

(1) Atas keterangan, plaintif telah membuktikan kesnya atas imbangan kebarangkalian. Namun jumlah yang diawadkan kepada plaintif tertakluk kepada pengurangan 30% kecuaian sertaan bagi pihak ibu bapa plaintif (lihat perenggan 155–156).

(2) Defedan kedua (SD2) telah melanggar kewajipan berjaga-jaganya kepada plaintif apabila gagal untuk menasihati dan/atau mengeluarkan surat rujukan kepada ibu bapa plaintif untuk membawa plaintif ke HSNZ dengan segera, sekiranya tidak serta merta, dari tarikh lawatan kedua plaintif ke HSNZ. Tiada apa-apa dalam laporan perubatan SD2 untuk menunjukan bahawa dia telah menjelaskan kepada ibu bapa plaintif keseriusan keadaan plaintif atau fakta yang dia telah menasihati plaintif untuk dibawa ke HSNZ dengan kadar segera. Tiada juga sebarang rekod bahawa ibu bapa plaintif enggan untuk membawa kanak-kanak tersebut ke HSNZ. Laporan perubatan SD2 juga tidak merekodkan saiz bengkak di leher walaupun melihatnya. Sewaktu lawatan kedua plaintif, saiznya telah meningkat. SD2 gagal untuk menunjukan sebarang keperluan untuk bertindak segera untuk memberikan plaintif pemeriksaan lanjut. Ini telah membawa kepada keadaan plaintif bertambah teruk yang merupakan punca dia mengalami kecacatan selama-lamanya (lihat perenggan 83–84, 86–87 & 89).

(3) Walaupun keadaan plaintif yang serius, sepertimana yang diakui oleh defendna ketiga hingga ke-12, plaintif hanya di periksa oleh soerang pakar hampir 14 jam lepas dia tiba di jabatan kecemasan HSNZ pada jam 10 malam. Defendan keempat atau keenam yang memeriksa plaintif merujuk perkara tersebut kepada pakar *on-call* dengan segera. Plaintif berada dalam keadaan berisiko tinggi dan sepatutnya dirujuk kepada

A seorang pakar tanpa sebarang penangguhan. Ianya dalam keterangan bahawa ultrasound dan x-ray telah dijalankan oleh defendan adalah tidak perlu dan satu CT scan sepatutnya dilakukan. Walaupun ianya dirancang untuk dilakukan seawal jam 9.54 pagi, sepertimana yang boleh dilihat dalam nota perkembangan hospital, CT scan tersebut hanya dibuat dua B jam selepas plaintif telah timbang. Adalah jelas bahawa defendan telah melanggar kewajipan berjaga-jaga mereka apabila gagal untuk bertindak dengan kadar segera untuk memastikan laluan udara plaintif tidak terhalang, kerana ini merupakan perkara yang secara muktamadnya meneybabkan kecederaan otak selama-lamanya kepada plaintif. Dalam C keseluruhan keadaan ini, defendan kelapan tidak bertanggungan kerana dia tidak pernah hadir (lihat perenggan 92–94 & 96–98).

(4) Kerana SD2 merupakan pekerja defendan pertama, defendan pertama adalah bertanggungan secara vikarious untuk kecuaian SD2. Sama, dan D selaras dengan s 5 Akta Prosiding Kerajaan 1956, defendan ketiga juga bertanggungan secara vikarious untuk kecuaian defendan lain yang merupakan pekerjanya. Kegagalan sistem di HSNZ pada waktu yang material yang melengahkan untuk menyelamatkan saluran udara plaintif dengan segera juga membuat defendan ketiga bertanggungan secara E langsung kepada plaintif untuk kegagal tersebut. Defendan pertama dan ketiga juga mempunyai tanggungjawab yang tidak boleh diwakilkan untuk memastikan doktor dan pakar perundingnya mempunyai kelulusan, keboleh dan kecekapan dalam menjalankan tugas mereka dalam merawat plaintif (lihat perenggan 103–107).

F (5) Kelewatan di pihak ibu bapa plaintif membawanya ke HSNZ adalah tidak munasabah, mengambil kira plaintif mempunyai demam berterusan dan bengkak di lehernya makin membesar. Isu masalah kewangan yang ditimbulkan oleh plaintif tiada merit dan hanya merupakan satu alsan kerana ibu plaintif merupakan seorang penjawat G awam dan mengetahui kelayakan dirinya dan anaknya untuk mendapatkan rawatan percuma di HSNZ. Untuk alasan-alasan tersebut, ibu bapa plaintif bertanggungan untuk kecuaian sertaan mereka. Liabiliti oleh itu dibahagikan pada kadar 15% untuk defendan pertama dan kedua, 55% untuk defendan ketiga hingga ke-12 (kecuali defendan H kelapan) dan 30% kepada ibu bapa plaintif (lihat perenggan 110–111).

(6) Awad ganti rugi berikut dibuat berkaitan dengan tempoh tujuh tahun dari 2011 dan tarikh plaintif memfailkan tuntutannya pada tahun 2018. Ganti rugi masa hadapan adalah berdasarkan jangka hayat 33 tahun I menggunakan pendarab 16 (lihat perenggan 30 dan 142):

(a) satu pertiga daripada RM1,945.25 yang dibuktikan, untuk perbelanjaan hospital dan perubatan (tiada alasan diberikan bahawa ianya memerlukan dan adalah munasabah untuk plaintif diawadkan dengan jumlah penuh yang dialami beliau di hospital swasta kerana hospital

kerajaan juga boleh menguruskan pesakit cerebral palsy. Juga pengataan bahawa ibu bapa plaintif boleh membawanya ke hospital kerajaan pada waktu pejabat kerana komitmen kerja adalah alasan yang tidak munasabah) (lihat perenggan 121–122);

(b) RM12,750 untuk perbelanjaan perjalanan (tiada alasan ditunjukkan untuk tuntutan plaintif untuk RM23,205 untuk perbelanjaan perjalanan pada kadar RM273 sebulan) (lihat perenggan 123–124);

(c) RM340 untuk laporan perubatan dan RM300 untuk perbelanjaan penemuan sebelum tindakan untuk mendapatkan laporan perubatan daripada defendan ketiga

(d) RM102,900 untuk kos penjaga/pembantu (lihat perenggan 129–131);

(e) RM18,133 untuk kos fisioterapi (lihat perenggan 132);

(f) RM9,141 untuk kos peralatan sokongan (lihat perenggan 133);

(g) RM35,000 untuk kos barangan penjagaan peribadi (lihat perenggan 134);

(h) RM40,635 untuk makanan khas dan RM2,268.35 untuk minyak perubatan (lihat perenggan 135–136);

(i) RM350,000 untuk kesakitan dan keseksaan dan kehilangan kemudahan kehidupan;

(j) RM35,000 untuk pembedahan tulang belakang dan peha akan datang (lihat perenggan 145);

(k) RM848,900 untuk kos akan datang peralatan dan perkakas dan lain-lain (lihat perenggan 143);

(l) RM384,000 untuk menggaji seorang pembantu (pada kadar RM2,000) sebulan (lihat perenggan 147);

(m) RM100,000 untuk ganti rugi teruk (kerana penyorokan defendan ketiga mengenai laporan perubatan plaintif dan menyebabkan plaintif membazir masa dan perbelanjaan untuk memfailkan penemuan pra-tindakan untuk mendapatkan rekod dan kerana keengganan defendan untuk menerima liabiliti tanpa mengambil kira keeterangan yang melampau berkenaan degan kecuaian mereka yang menyebabkan distres kepada plaintif dan ibu bapanya (lihat perenggan 151–153); dan

(n) faedah pada kadar 4% setahun atas ganti rugi khas dari 5 September 2011 sehingga tarikh penghakiman; faedah pada kadar 8% setahun untuk ganti rugi sebelum perbicaraan dan ganti rugi am dari tarikh penyerahan writ hingga tarikh penghakiman, dan faedah pada kadar 5% sebulan pada keseluruhan jumlah penghakiman dari tarikh

penghakiman sehingga tarikh penyelesaian penuh (lihat perenggan 154).]

Cases referred to

ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd [2001] 3 MLJ 641; [2001] 8 CLJ 1, HC (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2017] 1 LNS 2112, FC (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (folld)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593, FC (refd)

Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal [2013] 4 MLJ 785; [2013] 8 CLJ 449, CA (folld)

Hamizan bin Abd Hamid v Wong Kok Keong & Anor [1994] 3 MLJ 630; [1994] 4 CLJ 122, HC (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (refd)

Jub'il bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd [2001] 6 MLJ 669; [2001] 4 CLJ 599, HC (refd)

Lim Zi Hong v Pengarah Hospital Selayang & Ors [2013] MLJU 1613; [2013] 10 CLJ 412; [2013] 1 LNS 788, HC (refd)

Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276; [1995] 3 CLJ 70, HC (refd)

Muhammad Yassein Zuliskandar (a child suing through his father and next friend; Zuliskandar Md Pechor) v Kerajaan Malaysia & Ors [2019] 4 CLJ 289; [2019] 1 MLRA 566, CA (refd)

Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2014] MLJU 1922; [2015] 1 CLJ 825, HC (refd)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324; [1983] 2 CLJ 198; [1983] CLJ Rep 300, FC (refd)

Pyu Pyu Ma v Dr Lim Soo How & Ors [2019] 11 MLJ 628, HC (refd)

Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102; [2017] 3 CLJ 311, CA (refd)

Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor [2006] 1 MLJ 57; [2006] 5 CLJ 175, HC (refd)

Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292; [1981] 1 LNS 106, FC (refd)

Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors 2017] 5 MLJ 438, FC (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)(i)
Government Proceedings Act 1956 s 5

Manmohan S Dhillon (Jeremy Balang with him) (PS Ranjan & Co) for the plaintiff.
Fozi Addhwa bin Mohamad Fozi (Nazifah Wahida bt Mohd Nazri, Nur Anizann bt Abd Majid and Abdul Aziz bin Hassan with him) (Azman, Wan Helmi & Assoc) for the first and second defendants.
Azliza Ali (Khairulhazman Ghazali with her) (Attorney General's Chambers) for the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, 11th and 12th defendants.

Abdul Wahab J:

INTRODUCTION

[1] This is an action filed by the plaintiff, Ahmad Thaqif Amzar bin Ahmad Huzairi through his mother and legal representative Majdah bt Mohd Yusof (PW1) claiming that the plaintiff had suffered severe and irreversible brain damage as a result of the defendants negligence conduct.

[2] The plaintiff had in the present case called the following witnesses:

(a) the mother and litigation representative of the plaintiff Puan Majdah bt Mohd Yusof (SP1);

(b) the liability expert, consultant otorhinolaryngologist Professor Datuk Paduka Dr Balwant Singh Gendeh (SP2);

(c) the quantum expert, consultant rehabilitation physician Dr Kavitha Uma Ratnalingam (SP3); and

(d) the father of the plaintiff Encik Ahmad Huzairi bin Ali (SP4).

[3] The first and second defendants had called the following witnesses:

(a) the second defendant, Dr Zainal Rashid bin Abdullah (SD8(D2)); and

(b) his liability expert, emergency and trauma physician Dr Mahathar Abd Wahab (SD9(D1)).

[4] The third to 12th defendants witnesses are as follows:

(a) the eighth defendant, Dr Khairuddin bin Ismail (SD1(D8));

(b) the fourth defendant, Dr Zaidatul Akmal bt Othman (SD2(D4));

(c) the sixth defendant, Dr Zul Akmar bt Zakaria (SD3(D6));

(d) the 11th defendant, Dr Rabiatul Aida bt Ramli (SD4(D11));

(e) the tenth defendant, Dr Mastural bt Mohamed (SD5(D10));

(f) the 12th defendant, Dr Abdul Karim Othman (SD6(D12));

(g) the seventh defendant, Dr Ahmad Mardzuki bin Ibrahim (SD7(D7));

(h) the ninth defendant, Dr Nik Nabihah bt Nik Razin (SD11(D9));

(i) the fifth defendant, Dr Muhammad Fathil bin Karim alias Kasim (SD10(D5));

(j) their liability expert, otorhinolaryngologist Dr Norzi bt Gazali (SD12); and

(k) their quantum expert, rehabilitation physician Dr Rahimah bt Nawi (SD13)

BACKGROUND FACTS

[5] The plaintiff was suffering from a fever and a swelling on his neck and was brought to the first defendant's hospital ('KTSH') and was treated by the second defendant on 30 August 2011, the second defendant had diagnosed the plaintiff with the following condition:

(a) a fever of 39.8°C;

(b) swollen cervical lymph node; and

(c) lymphadenitis inflamed.

[6] Upon examination, the second defendant had prescribed the plaintiff with the following medicine:

(a) Paracetemol syrup;

(b) Brufen syrup; and

(c) Unasyn syrup.

[7] On 1 September 2011, the plaintiff's parents had brought him to KTSH for a second time ('second visit') and the plaintiff was again examined by the second defendant. Upon examination by the second defendant, it was discovered that the plaintiff's temperature had dropped to 37.8°C and that the cervical swelling had increased in size.

[8] The second defendant had advised for the plaintiff to be warded at KTSH to be referred to the pediatrician/ENT specialist, but the said admission was refused by the plaintiff's parents and the plaintiff was brought home instead.

[9] Five days later, PW1 had brought the plaintiff to Klinik Engku Shaikh where a referral letter was issued to refer the plaintiff to Hospital Sultanah Nur Zahirah (HSNZ).

[10] The plaintiff's parents had on 5 September 2011 at 11.15pm brought the plaintiff to HSNZ where the plaintiff was attended by a medical officer at HSNZ at 12.49am.

[11] At about 1.47am on 6 September 2011, Thaqif was seen by the house officer Dr Zaidatul, the fourth defendant. She prescribed medications and noted that his pulse rate was 112 beats per minute.

[12] At about 8.52am, the fourth defendant saw Thaqif again. The plan was for Thaqif to undergo an examination of the neck and an x-ray examination.

[13] At about 9.11am, Thaqif was seen by yet another house officer Dr Zul Akmar, the sixth defendant. She had incorrectly noted that Thaqif had 'right neck swelling'.

[14] At about 9.54am, Thaqif was seen by the sixth defendant and Dr Fathil, the fifth defendant. The x-ray investigation was undertaken and a plan was made to discuss Thaqif's case with a specialist. A CT scan investigation was also planned to be done following an assessment by a specialist.

[15] At about 11.01am, Thaqif was seen again by the fifth and sixth defendants. The sixth defendant corrected her previous error in the medical records to now read 'left neck swelling'. However, the plan for Thaqif remained the same.

[16] At about 12.12pm, Thaqif was finally seen by a specialist, the seventh defendant Dr Mardzuki, a general surgeon. Thaqif was also seen by Dr Nabihah, the ninth defendant. The seventh defendant then performed a bedside ultrasound examination and noted a multilocular collection. The plan was made for the Ear, Nose and Throat ('ENT') Department to review Thaqif.

[17] At about 1:41pm, Thaqif was seen again by the ninth defendant, who had been informed by a nurse that Thaqif was showing signs of tachycardia. It was noted that Thaqif had a temperature of 38.9C, a pulse rate of 178, a respiratory rate of 35 and a SPO2 reading of 100%. The ninth defendant then ordered for medicines to be given and for tepid sponging to be done.

[18] At about 2.56pm, Thaqif was finally seen by a medical officer from the ENT department, ie Dr Mastural, the tenth defendant. She examined Thaqif

and noted that he was mildly tachypnoeic and had soft noisy breathing. She also noted that the swelling was 'warm, very tender and inflamed'. She made a diagnosis of a left parapharyngeal abscess and ordered an emergency CT scan investigation of the neck. She also referred Thaqif to the anaesthesia department for intubation and scheduled Thaqif for surgery after the CT scan investigation.

[19] At about 3pm, Thaqif was seen by an anaesthesiologist Dr Rabiatul, the 11th defendant. She discussed the case with a fellow anaesthesologist Dr Karim, the 12th defendant, and a decision was made to transfer Thaqif to the operating theatre for an 'elective intubation'.

[20] However, on the way to the operating theatre, Thaqif began gasping and collapsed. He was resuscitated, ventilated and moved to the paediatric intensive care unit. The CT scan investigation was postponed with a view to stabilising Thaqif's condition.

[21] At about 6.20pm, Thaqif finally underwent the CT scan investigation. It revealed a massive left neck abscess with an oesophageal fistula. At about 9.30pm, Thaqif underwent a direct laryngoscopy and neck exploration of the loculated neck abscess. He was placed on a ventilator post-operatively.

[22] He was later diagnosed to have suffered hypoxic ischemic encephalopathy and was discharged from HSNZ on 6 October 2011.

[23] The plaintiff claimed that the defendants were negligent in the carrying out of their duty as follows:

(a) inadequate and/or poor medical records provided by the second defendant;

(b) failure by the second defendant to provide advice and information regarding the seriousness of the plaintiff's condition;

(c) no investigations carried out and inadequate treatment provided by the second defendant;

(d) failure to take adequate history in respect of the plaintiff's condition;

(e) failure to secure the plaintiff's airway in a timely fashion;

(f) there was a delay in specialist intervention;

(g) the plaintiff was subjected to unnecessary radiological investigations ie the ultrasound investigation and a bedside ultrasound examination;

(h) there was a delay in conducting a CT scan; and

(i) there was a triaging failure in getting a specialist to attend to the plaintiff in a timely manner.

[24] Since the events that occurred in 2011, the plaintiff has been fully dependent on others for all activities of daily living with no prospects at all of recovering from his disabilities.

THE PLAINTIFF'S SUBMISSION

Liability

[25] The plaintiff submitted that the second defendant had failed to advise the plaintiff's parents on the seriousness of the plaintiff's condition and that the second defendant's medical records were scanty and revealed nothing of the advice he claimed to have given to the plaintiff's parents.

[26] The plaintiff submitted that the fourth defendant's failure to take an adequate history of the plaintiff's condition had contributed to the lack of awareness on the part of the fourth to 12th defendants and/or the other servants and agents of the third defendant as regards the dangers posed to Thaqif. Such failure had also contributed to the delays in specialist intervention and in securing his airway.

[27] It was the plaintiff's main case that the delay in specialist intervention, in securing the plaintiff's airway and in conducting the CT scan investigation on the part of the defendants had caused the plaintiff to suffer irreparable damage.

[28] It was also the plaintiff's case that the plaintiff's condition required multi-disciplinary management, namely in anaesthesiology, radiology, otorhinolaryngology and paediatrics. However, the evidence shown that there was no 'captain' of such team. It was thus the plaintiff's submission that in view of the failure on the part of the multi-disciplinary team, the members have to collectively accept responsibility for their failure.

[29] The plaintiff further pleaded that the first and third defendants each owed a non-delegable duty to the plaintiff and that they were vicariously liable for the negligence of their respective servants and agents.

Quantum

[30] Thaqif was first seen by the first defendant hospital on 30 August 2011, and the statement of claim was filed on 24 September 2018. The plaintiff had

thus claimed for special damages for the total sum of RM582,141 for the said period of 85 months, details are as set out in the table below:

No	Expenses	Sums claimed (RM)
1	Hospital and medical	7,800
2	Travelling	23,205
3	Medical reports fees	340
4	Cost of pre-action discovery of medical records	7,420
5	Cost of caregiver/maid	173,160
6	Value of care provided by family members	212,500
7	Costs of physiotherapy	53,760
8	Supporting equipment	9,141
9	Personal care items	37,110
10	Special food	41,565
11	Medicinal oils	4,140
12	Costs of holidays	12,000

[31] The plaintiff had in the instant case proceeded to claim pre-trial damages calculated from the date of the statement of claim ie 24 September 2018 up to the date of delivery of decision for the period of 21 months for the total sum of RM111,006, details are as set out in the table below:

No	Expenses	Sums claimed (RM)
1	Travelling	23,205
2	Cost of caregiver/maid	32,760
3	Value of care provided by family members	52,500
4	Personal care items	9,177
5	Special food	10,269

[32] In determining the life expectancy of the plaintiff, it was submitted that the benefit of the doubt should be given to the plaintiff, as such the life expectancy of the plaintiff should be determined as 38 years, which is 33 years estimated by Dr Kavitha and an additional of five years on account of 'favourable economics' as suggested by Dr Rahimah.

[33] The multiplier to be applied in the instant case as submitted by the plaintiff is calculated as below:

Life expectancy	38	
Less current age	(10)	
Less 15% for contingencies	(4.2)	
Multiplier	23.8	= 24 years

[34] In respect of future damages, the plaintiff had claimed for the cost of equipment, appliances and other needs for the total sum of RM1,988,260, the cost of medical, therapy and other services (eg respite care, part-time driver and full time maid) for the total sum of RM2,220,440, cost of medicines for the total sum of RM773,560, value of care given by family members for the total sum of RM720,000, additional cost of holidays for the total sum of RM72,000, cost of accommodation and living expenses in adulthood for the total sum RM864,000.

[35] The plaintiff had further claimed for award of general damages for pain and suffering and loss of amenities in the sum of RM400,000.

[36] It was also the plaintiff's submission that the defendants' conduct in denying liability and in blaming the plaintiff's parents for injuries suffered had aggravated the damages suffered by the plaintiff, as such the plaintiff had claimed the total sum of RM500,000 as aggravated damages.

[37] It was also submitted that the plaintiff is entitled to interest as follows:

(a) at 4%pa on special damages from 30 August 2011 to the date of judgment;

(b) at 8%pa on pre-trial damages and general damages for pain and suffering and loss of amenities of life from date of service of writ to the date of judgment; and

(c) at 5%pa on the judgment sum from the date of judgment to dare of full payment.

[38] The plaintiff also submitted that medical negligence litifation is difficult, complex, time-consuming and often involves novel questions of law and thus very expensive, as such the plaintiff claimed for the out-of-pocket expenses incurred by the plaintiff in the sum of RM46,747.

[39] The plaintiff had further claimed the getting-up fee for the assessment of damages proceedings for the total sum of RM400,000.

A THE FIRST AND SECOND DEFENDANTS' SUBMISSION

Liability

[40] The first and second defendants' defence can be summarised as follows:

B

(a) that there was a delay of five days on the part of the plaintiff's parents in seeking treatment at KTSH and/or HSNZ from their second visit to the first defendant's hospital;

(b) that the examination and/or treatment provided by the second C defendant to the plaintiff were sufficient at the material time;

(c) that the second defendant had advised the plaintiff's parents to admit the plaintiff into the first defendant's hospital for further examination by the pediatrician and/or ENT specialist;

D (d) that the second defendant had advised the plaintiff's parents to refer the plaintiff to HSNZ for further examination or treatment; and

(e) that the second defendant had sufficiently taken the plaintiff's record of history eventhough such record was not put into writing.

E

[41] It was the defendants submission that the second defendant had adhered to the standard of care of a reasonable medical officer in attending to the plaintiff and that records taken and treatment provided to the plaintiff by the second defendant was sufficient in view of the plaintiff's condition at the F material time.

[42] It was also the defendants' submission that the second defendant had in the instant case advised the plaintiff's parents to admit the plaintiff into the first defendant's hospital or to refer plaintiff to HSNZ for further examination, but G the said advise allegedly went unheeded by the plaintiff's parents.

[43] The second defendant had further claimed that advise was given by him to the plaintiff's parents regarding the seriousness of the plaintiff's condition and the risk that follows suit should the plaintiff not receive the necessary H treatment.

[44] It was the first and second defendants' main submission that they did not cause the permanent injury suffered by the plaintiff in view of the delay by the plaintiff's parents to get the plaintiff treated in a timely manner as well as I the delay on the part of the fourth to 12th defendants in attending to the plaintiff upon being admitted to HSNZ which had led to the plaintiff's 'collapse' incident on 6 September 2011.

Quantum

[45] It was the first and second defendants' submission that the quantum of damages claimed by the plaintiff was exorbitant and unreasonable on the ground that the health treatment as well as physiotherapy can be obtained from the government hospital without any charges imposed. It was thus the first and second defendants' submission that the plaintiff are not entitled to claim for costs incurred from seeking treatment at private hospital.

[46] Alternatively, the first and second defendants submitted that should the plaintiff seek for treatment at private hospital, the plaintiff may be entitled to claim for only 1/3 of the total sum expended.

[47] The first and second defendants submitted that the plaintiff is bound by his pleading in the claim for special damages for the total sum of RM528,485 only, the plaintiff is therefore barred from claiming for the total sum of RM582,141 as stated in his submission.

[48] In view of the lack of documentary evidence in support of the plaintiff's claim for special damages, the first and second defendant had suggested the following award of damages:

No	Expenses	Sums to be awarded (RM)
1	Travelling	10,000
2	Medical reports fees	340
3	Supporting equipment	To the extent proven
4	Personal care items	To the extent proven

[49] The first and second defendants submitted that the plaintiff is not entitled to claim for special food as it was naturally the duty of the plaintiff's parents to provide for the welfare of the plaintiff even if the plaintiff had not suffered the injury as he did.

[50] The first and second defendants submitted that the plaintiff are not entitled to claim for the medicinal oil for the total cost of RM4,140 as the said medicinal oil was 'prime enema' which was not prescribed by the doctor and was administered to the plaintiff by his parents on their own inisiative. Be that as it may, the plaintiff had in his statement of claim, claimed for the total sum of RM380 only and was only able to produce payment receipts for the total sum of RM2,288.35 only for the said medicinal oil.

[51] The first and second defendants submitted that the plaintiff's claim for costs of holiday are frivolous and vexatious as it was not a necessity.

[52] The first and second defendants also submitted that the plaintiff is not entitled to claim against them the pre-action discovery of medical records as the first and second defendant had given their full cooperation in supplying the plaintiff with the necessary documents with no costs imposed.

[53] In respect of pre-trial damages, the first and second defendant had suggested the following award of damages:

No	Expenses	Sums to be awarded (RM)
1	Travelling	4,000
2	Personal care items	To the extent proven

[54] The first and second defendant submitted that the plaintiff was not entitled to claim for cost of caregiver/maid as from the time this action was filed to date no such service was engaged by the plaintiff's parents and the parents and/or his grandparents were able and had provided the plaintiff with the care he needed at no extra costs.

[55] In respect of the multiplier calculation, the first and second defendant had suggested the following method of calculation:

Life expectancy	30	
Less current age	(10)	
Less 1/3 for contingencies	(6.6)	
Multiplier	13.4	= 14 years

[56] In respect of future damages, the first and second defendants had submitted that the plaintiff is entitled to claim for the cost of equipment, appliances and other needs for the total sum of RM600,200, the cost of medical, therapy and other services for the total sum of RM30,000, cost of medicines for the total sum of RM23,100.

[57] The first and second defendants submitted that the plaintiff is not entitled to claim value of care given by family members as it was the parents duty to care for the plaintiff whether or not he had suffered the injury as in the instant case. The first and second defendant nevertheless submitted that should the court finds it favourable to award the plaintiff with such cost, the plaintiff is only entitled to claim for the total sum of RM420,000.

[58] The first and second defendants submitted that the claim for cost of holidays by the plaintiff was frivolous and vexatious and ought not to be granted as it was not a necessity. Alternatively, the first and second defendant submitted that sum claimable by the plaintiff for the cost of holiday should be for the total sum of RM42,000 only.

[59] The first and second defendants submitted that the cost of accommodation and living expenses of the plaintiff in adulthood after attaining the age of 18 for the total sum of RM864,000 (RM3,000/month x 24 years) claimed was excessive and exorbitant and that such claim should be limited to a total of RM108,000 only (RM1,000/month x 6 years). A B

[60] The first and second defendants submitted that the maximum general damages to be awarded to the plaintiff should be for the total sum RM200,000 only.

C

[61] The first and second defendants also submitted that the plaintiff should not be entitled to claim for the aggravated damages as claimed in view of the plaintiff's parents own delay in getting the plaintiff treated in a timely manner which had caused the permanent disability suffered by the plaintiff in the instant case. The first and second defendants had in the alternative suggested the sum of RM150,000 to be the reasonable sum to be awarded for aggravated damages. D

[62] The first and second defendants suggested that a 5% interest per annum was sufficient to be imposed on the judgment sum as well as costs awarded. E

[63] The first and second defendants further submitted that the claim for RM400,000 by the plantiff for the getting-up fee was exorbitant and that the reasonable sum to be awarded should be within the total sum of RM35,000 to a maximum of RM150,000 only. F

[64] On the other hand, if the plaintiff's claim is dismissed, the first and second defendants claimed against the plaintiff the total costs of RM100,000.

THE THIRD TO 12TH DEFENDANTS' SUBMISSION G

Liability

[65] The third to 12th defendants submitted that there was no negligent on their part as the diagnosis made by DW5 and DW10 stating that the plaintiff was suffering from left neck swelling with signs and symptoms suggestive of left neck abscess, the initial treatment and medicines administered to the plaintiff were correct and met the reasonable standard of treatment for the plaintiff as the plaintiff was in a stable condition and there were no clinical evidence of acute upper airway compromise at the material time. H I

[66] It was also the defendants' submission that the medical treatment plan and the management decision carried out by the fourth to 12th defendants for the plaintiff had met the reasonable standards of treatment and care to be

provided in similar case as such it was their submission that the fourth to 12th defendants had discharged duties with due care and skill according to the generally approved medical practice at the material time.

[67] The third to 12th defendants further submitted that the injuries suffered by the plaintiff were due to the delay on the part of the plaintiff's parents in bringing the plaintiff to HSNZ for treatment. It was thus the third to 12th defendants' contention that there was no causal link between the third to 12th defendants and the plaintiff's injury when there was delay and failure on the part of the plaintiff's parents in seeking for treatment in a timely fashion.

[68] The third to 12th defendants submitted that the physical examination, diagnosis, treatment and surgery carried out on the plaintiff was not delayed and was carried out on the same day which was on 6 September 2011 and the defendants' conduct had met the standard of medical practice based on the plaintiff's condition at all material times.

[69] The third to 12th defendants contended that the plaintiff's injury was caused by the plaintiff's parents themselves and the plaintiff was thus not entitled to claim for any damages, interests and costs pleaded.

Quantum

[70] The third to 12th defendants contended that the plaintiff's mother was a civil servant and the plaintiff being the child of a civil servant was entitled to free medical benefits at government hospitals. It was therefore submitted that the plaintiff was not entitled to claim for costs incurred for hospital and medical expenses sought by the plaintiff at private hospital when such treatments was readily available to the plaintiff at government hospital free of charge.

[71] The third to 12th defendants submitted that due to the lack of evidence in support, the plaintiff's claim for damages ought to be dismissed in respect of travelling expenses and fees for medical reports.

[72] In view of the lack of documentary evidence in support of the plaintiff's claim for special damages, the third to 12th defendants had suggested the following award of special damages:

No	Expenses	Sums claimed (RM)
1	Cost of pre-action discovery of medical records	300
2	Cost of caregiver/maid	50,000

3	Costs of physiotherapy	18,133 (if any)
4	Supporting equipment	9,246
5	Personal care items	35,000
6	Special food	40,635

[73] In respect of the multiplier calculation, the first and second defendant had suggested the following method of calculation:

Life expectancy	30
Less current age	(9)
Less 1/3 for contingencies	(7)
Multiplier	14

[74] The third to 12th defendants submitted that the maximum general damages to be awarded to the plaintiff should be for the total sum RM350,000 only.

[75] In respect of future damages, the third to 12th defendants had submitted that the plaintiff is entitled to claim for the following costs:

No	Expenses	Costs to be awarded (RM)
1	Value of care provided by family	84,000
2	Therapy/rehabilitation costs	35,000
3	Costs of vehicle	178,000
4	Costs of medicine and nutrition	11,496
5	Costs of medical equipment and appliances	127,700

COURT'S FINDINGS

Principles of the law

[76] The duty behoves upon the plaintiff to satisfy this court on the balance of probabilities that the defendants had breached their duty of care in relation to the particulars of negligence set out in the pleadings.

[77] The standard of care in medical negligence cases had been re-stated in the Federal Court case of *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* 2017] 5 MLJ 438 as follows:

(a) In respect of the standard of care in medical negligence cases, a distinction should be made between diagnosis and treatment on the one hand, and the duty to advise of risks on the other.

(b) In regard to the standard of care for diagnosis or treatment, the test as expounded

in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 11 , and as further 'glossed' and explained by the House of Lords in *Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151 still applied. In *Bolam* the court held that:

> ... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent ...

The House of Lords in *Bolitho* added a 'gloss' over the *Bolam* test and stated that in applying that test the court had to be satisfied that the exponents of a body of professional opinion relied upon by the medical professional had demonstrated that such opinion had a logical basis and capable of withstanding logical analysis by the court.

(c) In cases of duty to advice of risks, the position in *Australia in Rogers v Whitaker* [1992] 175 CLR 479 would apply, namely it is now for the courts (rather than a body of respected medical practitioners) to decide whether a patient has been properly advised of the risks associated with a proposed treatment.

FIRST AND SECOND DEFENDANT

Breach of duty of care

[78] By reason of a doctor-patient relationship between the second defendant and the plaintiff, it is thus a non-issue that the second defendant owed the plaintiff a duty of care for a period of which the plaintiff was under his care.

[79] The plaintiff was brought to see the second defendant on 30 August 2011 due to his fever as well as swelling developed on the left side of his neck. The plaintiff's parents claimed that the second defendant had prescribed the plaintiff with medicines for the fever and told the parents to come back in a few days time if the swelling did not subside.

[80] The plaintiff returned to KTSH on 1 September 2011 due to his fever which did not subside as well as an increased left neck swelling. The second defendant had requested the sum of RM1,000 to be paid as a deposit before the plaintiff could be admitted. The plaintiff's parents could not afford the said sum and the plaintiff was thus not admitted.

[81] The plaintiff's claim against the second defendant revolves on the failure of the second defendant to advise on the risk of the impending condition affecting the plaintiff as a result of the swelling on the plaintiff's neck. As such, the applicable test in the instant case was the two-limbed *Bolam* test as explained in the case of *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1

MLJ 593 as follows:

> [11] Relying on that direction which is now accepted as the *Bolam* Test or *Bolam* Principle and the divergent medical evidence, the jury found that the hospital was not negligent. There are two limbs to the *Bolam* Test. The first is the requirement of a professional person in this case a doctor, to exercise reasonable care in undertaking the task associated with his particular professional calling. The second being commonly invoked, is the assertion that a defendant doctor will not be liable under the first limb if he has complied with a responsible professional practice, allowing for the possibility that there may be more than one such practice.

[82] SP1 and SP3 had admitted during trial that the second defendant had advised them to get the plaintiff warded at KTS but due to financial constraint, they could not get him admitted as advised. The second defendant further claimed that advice was given for the plaintiff to have the plaintiff referred to HSNZ but the said advice went unheeded.

[83] Upon careful scrutiny of evidence as adduced before this court, there was however a total absence of evidence to support the second defendant's claim that he had advised the plaintiff's parents to refer the matter to HSNZ nor were there any record made of the plaintiff's parents refusal to refer the matter to HSNZ.

[84] The second defendant had failed to advise the parents of the seriousness of the plaintiff's condition. There was no documentary evidence to prove the advice given by the second defendant as claimed. The second defendant had further admitted during trial that he did not inform the plaintiff's parents regarding the impending complication of the swelling as follows:

> Q: Did you tell the patient's parents of the risks of the swelling affecting the airway?
>
> A: Ketika itu swelling itu kecil lagi, tak terlintas untuk beritahu risiko untuk airway because swelling masa itu kecil lagi.

[85] Having carefully examined the medical report prepared by the second defendant, it is apparent that there was a serious inadequacy of relevant information in the said report, this notion was supported by SP2 as well as SD9 in their evidence at trial as follows:

SP2's evidence in cross-examination:

> Q: Now we come to the first hospital. Why do you say the medication given there was not appropriate?
>
> A: Patient had a lymph node palpable. Now, this is a tip of the iceberg. Was an oral examination done at that moment to show that what was the status of the tonsils, was it pushed medially? And the notes were not adequate at all.

Q: Now, my learned friend asked you about the size of the abscess getting bigger. We know from the second hospital the size of the abscess is 6cm, you mentioned it. Did the first hospital record the size of the anscess.

A: No

SD9's evidence in cross-examination:

Q: Now, I take you to Bundle B, page 2, the first hospital's documents. Doctor, you take the second visit, 01.09.2011, in a case like this, cervical swelling with the 'arrow', are the medical records adequate?

A: No

Q: Not adequate at all?

Q: Then go to the first visit, 30.08.2011. Surely, the size and location of the swelling should have been noted, correct Doctor?

A: Yes

Q: Properly, an anatomical drawing should have been made so that the clinicians looking at it can see where exactly is the swelling, right Doctor?

A: Yes

Q: And the attending doctor should provide advice and information to the parents regarding the risk that this swelling can pose to the child?

Q: And such advice and information should be recorded in the case notes?

A: Yes

[86] A thorough scrutinisation of the expert report prepared by Dr Mahatar further revealed the insufficient information provided by the second defendant in his medical report. There was nothing in the medical report indicative of the second defendant's advice particularly regarding the risk of the plaintiff's impending condition due to the swelling.

[87] Having thoroughly scrutinised the evidence before this court, I find a total lack of evidence concerning the sufficiency of examinations carried out by the second defendant in exercising his duty as a medical officer. There was nothing in his medical record, recording the size of the swelling despite noting that there was an increase in the size of the swelling.

[88] Both SP2, as well as SD9, agreed that there arises a fundamental duty for an attending doctor to persuade patients and their family members regarding the necessary procedure and/or treatment to be adopted taking into account the seriousness of the patient's health condition.

[89] It is in my considered view that the second defendant had breached his duty of care in failing to advise and/or to issue a referral letter to the plaintiff's parents to refer the plaintiff to HSNZ soonest if not immediately from the date

of the plaintiff's second visit to KTSH. The evidence, in this case, supports the characterisation of the risks as material risks which ought to have been conveyed to the plaintiff's parents. The second defendant had in my considered opinion failed to demonstrate the urgency to subject Thaqif to further examination as to his condition which had resulted in the aggravation of the plaintiff's condition causing the plaintiff to suffer the permanent disability.

THIRD TO 12TH DEFENDANTS

Breach of duty of care

[90] It was the plaintiff's main case that the failure on the part of the defendants to secure the plaintiff's airway promptly which had caused the plaintiff to suffer permanent damage to the brain. As such, the same test above ie the *Bolam* test applies in determining whether the third to 12th defendants had breached the standard of care in diagnosing, treatment and advice provided to the plaintiff.

[91] Both the defence liability experts and the defendants themselves have appreciated the risk of the plaintiff's airway being blocked and agreed on the necessity in taking measures to secure the plaintiff's airway promptly which the defendants had failed to do in the instant case. The risk that the large abscess carries in the obstruction of the plaintiff's airway has been affirmed time and time again by the witnesses for the plaintiff as well as the defendants.

[92] Despite the seriousness of the plaintiff's condition as admitted by the defendants, the plaintiff was only attended by a specialist almost 14 hours after he was first received by the A&E Department at about 10pm SD2 (the fourth defendant), the first medical officer who attended to the plaintiff had, at the material time, no knowledge in respect of a young child's airway. Neither the first (the fourth defendant) nor the second medical officers (the sixth defendant) attending to the plaintiff had any authority to order for emergency treatment to be conducted on the plaintiff without first referring to their senior medical officers.

[93] The fourth and sixth defendants had failed to refer the matter to a specialist with promptitude despite a specialist on call could have been requested to attend to the plaintiff as confirmed by the seventh and 12th defendants in their oral testimony as follows:

SD7's (seventh defendant) evidence in cross-examination:

> Q: Doctor, at your hospital, if a specialist is required to attend to the patient, there are specialists on-call who can be woken up from their sleep to come and attend to the patient?

A: Yes, of course, definitely

SD6's (12th defendant) evidence in cross-examination:

Q: That night, when the patient arrived, the doctors, having seen the patient, should have called a specialist to attend to the patient immediately?

A: Sadly, yes.

SD6's (12th defendant) evidence in cross-examination:

Q: That night, when the patient arrived, the doctors, having seen the patient, should have called a specialist to attend to the patient immediately?

A: Sadly, yes.

[94] The seventh defendant, however, had also testified that there is triaging of risk profiles of every patient in HSNZ; and that Thaqif was a high-risk patient; and that there must be a safe system for referring high-risk cases like that of Thaqif to the specialist without delay:

Q: Doctor, in a hospital setting, there is a triaging of the risk profile of each patient?

A: That's right, I agree

Q: The whole idea of triaging is to identify the high risk patients so that they can be attended to as soon as possible?

A: Yes. That's why in our department, to minimize the overlook thing, we managed to do morning rounds, morning rounds meaning that morning discussion, we discuss all the patients during that day. So that's why in that sense we can minimize the potential of not pick up any urgency there. Of course, in that morning, we will discuss all the patients from A to Z, ICU patients, critical patients, admitted which needs more urgent attention. So we already done our triage during the morning, so called as morning discussion rounds

Q: Now Doctor, given the clinical information you all have of this child that morning, his was a high risk case, would you agree with me?

A: From my looking into the child's condition, yes, I agree

Q: Look at page 795 of Bundle D, this is the triaging at the Accident & Emergency Department. Doctor, prevention is better than cure?

A: I agree

[95] Based on the HSNZ progress note, at 1.41pm about two hours before the plaintiff collapse, the patient was already tachycardic which indicates a risk of the plaintiff going into shock and/or collapse and that urgent treatment needs to be provided in such a case as agreed by SD12:

Q: Jadi Doktor, setuju tak kalau saya cadangkan, berdasarkan kepada progress note, keadaan pesakit pada 06.09.2011 sekitar jam 1.41 petang, disebabkan ia dah jadi tachycardic, kalau tidak dirawat dengan sewajarnya, dia akan menyebabkan shock ataupun collapse kepada pesakit?

A: Yes, tetapi dari segi duration, kita tidak boleh tahu bila dia akan berlaku secara tepat, dari segi jangkaan. Tapi gejala itu ... (unintelligible) ... ada

Q: Doktor, setuju saya cadangkan kepada Doktor, sekiranya perawatan tidak diberikan segera kepada pesakit pada waktu itu, pesakit memang akan collapse ataupun mengalami septic shock?

A: Berkemungkinan tetapi tidak boleh dipastikan secara tepat exactly bila

Q: Doktor setuju tak kalau saya cadangkan yang pembedahan yang sepatutnya dijalankan kepada pesakit pada waktu itu sepatutnya dilakukan dengan lebih awal untuk mengelakkan pesakit daripada kena septic shock ataupun collapse?

A: Yes

[96] SD12 had further in his testimonial evidence agreed that ultrasound, as well as x-ray examination, carried out by the defendants, were unnecessary procedures and that an early CT scan should have been ordered given the circumstances of the case. Although CT scan investigation was planned as early as 9.54am as evident from the progress note, the CT scan was, however, only conducted on the plaintiff about two hours after he had collapsed with a view to first stabilise the plaintiff's condition.

[97] Based on the factual matrix of the case, it is in my considered view that the defendants had breached their duty of care to secure the plaintiff's airway in a timely manner, the defendants had also failed to make the necessary attempt to bring to the attention of the relevant specialist the urgency to attend to the plaintiff which had led to the injuries suffered by the plaintiff. It is in my considered opinion that the lack of urgency on the part of the defendants was very starking.

[98] I am however of the considered opinion that the eighth defendant should not be made liable because he was not present nor was he involved in the operation conducted on 6 September 2011.

VICARIOUS LIABILITY

[99] In considering the issue of vicarious liability, I am guided by the Federal Court case of *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 where it was held as follows:

Whether private hospitals in Malaysia such as the Appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising at such private hospitals as independent contractors?', the Federal Court at p 565 stated:

The test for vicarious liability in various claimants requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act

A by the practitioner. The determination is a question of fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.

[100] The Federal Court had in the same breath held on the doctrine of non-delegable duty as follows:

C Non-delegable duties are based on an assumption of responsibility, inferred from the circumstances of the relationship between the plaintiff and the defendant. It is not imposed based on relative resources or vested interest, nor does it depend on the terms of the relationship between the defendant and the person to whom the duty is delegated. The personal choice of a patient is not an independent test in itself but a relevant factor in applying the Woodland analysis, in particular in determining whether there is an antecedent patient-hospital relationship from which to impute as assumption of responsibility by the hospital towards the patient.

The facts in this case point against the existence of such an antecedent relationship. From the circumstances surrounding the plaintiff's engagement of Dr Kok and admission to the Hospital, it can be inferred that the plaintiff reasonably expected the operation to be conducted by Dr Kok with due care, wherever Dr Kok referred him to do so; the Hospital would merely provide the relevant facilities required for his admission and operation. In respect of the conduct of the operation by Dr Kok, we do not find that the Hospital has assumed a positive duty to protect the plaintiff from injury.

This scenario can be contrasted with a hypothetical situation where a patient enters a hospital and relies upon the latter's internal system to be referred to any suitable doctor on duty.

In that situation, the hospital having accepted the patient and undertaken to treat him may well be under a non-delegable duty to ensure that he is treated with due care, by whomever the hospital engages to do so.

(See also the case of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2017] 1 LNS 2112.)

[101] James Foong J (as he then was) in *Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor* [2006] 1 MLJ 57; [2006] 5 CLJ 175 laid out three requirements to be satisfied in order to establish vicarious liability as follows:

[33] As regards to whether the second defendant is vicariously liable for the alleged wrongdoing of the first defendant, three requirements must be satisfied. First, there must be a wrongful, or tortuous action. Second, there must exists special relationship that is recognized by law between the person alleged to be vicariously liable and the tortfeasor. Third, the tort is committed within the course of

employment — *Law of Torts in Malaysia* (2nd Ed) by Norchaya Talib at p 368.

[102] I find it germane at this juncture to also refer the case of *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 MLJ 628 where it was held that a healthcare provider may be held directly liable for not having a proper and effective system as well as for organisational failures.

[103] It was not disputed that the second defendant was an employee of the first defendant. The first defendant is therefore vicariously liable for the negligence of the second defendant.

[104] It is generally the position for the public hospitals that its doctors or nursing staffs are the direct employees of the public hospital, and it is trite law that the Government of Malaysia is liable for the negligence of its servants and agents. Section 5 of the Government Proceedings Act 1956 provides for the government's vicarious liability in tort as follows:

> 5 Liability of the Government in tort
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

[105] In view of my findings above in respect of the defendants negligence conduct, it is thus in my considered view that the first and third defendants are vicariously liable for the negligence conduct of their employees.

[106] In this case, the first and third defendants also owed a non-delegable duty to the plaintiff to ensure that the doctors/consultants have the necessary qualification, skill and competence to carry out their tasks in treating the plaintiff.

[107] Based on the factual matrix of the present case, this court also finds that there is a system failure in the HSNZ at the material time in respect of the delay in securing the airway of the plaintiff promptly, the third defendant was thus directly liable to the plaintiff for such failure (see the case of *Lim Zi Hong v Pengarah Hospital Selayang & Ors* [2013] MLJU 1613; [2013] 10 CLJ 412; [2013] 1 LNS 788).

A CONTRIBUTORY NEGLIGENCE

[108] It was SP1's evidence at trial that they were advised to ward the plaintiff on their second visit to KTSH but the plaintiff did not do so due to financial constraint and that SP1 did not take the plaintiff to HSNZ immediately:

[109] SP2 had in his evidence agreed that the five days gap had caused the abscess on the plaintiff's neck to become bigger and that the plaintiff's infection could have been avoided or mitigated if the plaintiff was brought to HSNZ earlier and not after five days. The same was also agreed by SD12 as follows:

> Q: Puan setuju ataupun tidak kalau saya cadangkan yang pada lawatan kedua ini, Dr Zainal Rashid tengok Thaqif, dia sekali lagi bagitahu kepada Puan yang Thaqif ini perlu diwadkan di KTS, betul atau tidak?
>
> A: Betul
>
> Q: Jadi selepas Dr Zainal Rashid jumpa Thaqif pada 01.09.2011, lawatan kedua itu, Puan tak ada lah wadkan Thaqif di KTS betul?
>
> A: Betul
>
> Q: Dan Puan juga tak ada refer ke Hospital Sultanah Nur Zahirah dengan terus, tak ada?
>
> A: Tidak

[110] Having analysed evidence as adduced before this court, I find the tardiness on the part of the plaintiff's parents to bring him to HSNZ was unreasonable. The plaintiff's persistent fever and the swelling on the plaintiff's neck which was increasing in size should have been a cause for concern and the parents should have taken active steps in bringing the plaintiff to a government hospital for further examination. It is in my considered opinion that the issue of financial constraint as raised by the plaintiff to be a mere excuse and unmeritorious as SP2 had in her oral testimony admitted that she was well aware of her and her child's entitlement to free medical treatment at the government hospital HSNZ.

[111] For the foregoing reasons above, I find that the plaintiff's parents had contributed to the injury as suffered by the plaintiff. A finding of contributory negligence would result in the apportionment of liability to the plaintiff (see *Hamizan bin Abd Hamid v Wong Kok Keong & Anor* [1994] 3 MLJ 630; [1994] 4 CLJ 122; and *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995] 2 MLJ 276; [1995] 3 CLJ 70). In the premises, I apportion liability at 15% to the first and second defendants, 55% to the third

to 12th defendants (except eighth defendant) and 30% to the plaintiff's parents.

QUANTUM OF DAMAGES

[112] In assessing damages, this court is mindful that damages serve as a compensation and are not meant to unjustly enrich the claimant nor punish the wrongdoer. The damages must be fair, adequate and not excessive based on cogent evidence before the court (see *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292; [1981] 1 LNS 106; *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198; [1983] CLJ Rep 300; *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885).

[113] It is well settled that as regards the assessment of damages for personal injuries is that damages are not punishment for the defendants' tortious act and are not a reward to the plaintiff for the injuries suffered as explained by the Federal Court in *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198; [1983] CLJ Rep 300, where Syed Agil Barakbah FJ in the judgment of the Federal Court explained the principle as follows:

> *It has to be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate. British Transport Commission v Gourley* and *HW West & Son Ltd v Shephard* [1963] 2 All ER 625. The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant (per Sir Alexander Cockburn, LJ in *Phillips v South Western Railway Co* [1879] 4 QBD 406). (Emphasis added.)

[114] It is also trite law that special damages must be pleaded and particularised and must be proved by either oral or documentary evidence (see *Jub' il bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd* [2001] 6 MLJ 669; [2001] 4 CLJ 599; *ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd* [2001] 3 MLJ 641; [2001] 8 CLJ 1 and *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2014] MLJU 1922; [2015] 1 CLJ 825).

[115] Since the events that occurred in 2011, the plaintiff has been fully dependent on others for all activities of daily living with no prospects at all of recovering from his disabilities as agreed by SD13:

> Q: Now, after Ahmad Thaqif achieves the age of 18, which is barely 8 years from now, do you expect him to be able to work and earn a living?

A: I don't think so

Q: In fact, his brain damage is irreversible?

A: Yes

Q: He will therefore, even after the age of 18, have to rely on the parents to provide him accommodation and utilities?

A: Yes

[116] The plaintiff is unable to feed on his own, sit, walk and stand unaided, engage in physical response, speak coherently, have a clear vision, pursue education to a level where he can be employed, socialise, get married, experience the joys of fatherhood, grow old together with his family and pass on eventually knowing that he had lived a fulfilling life.

Hospital and medical expenses

[117] The plaintiff had pleaded the sum of RM7,800 as medical and hospital expenses. It was the plaintiff's assertion that the plaintiff's parents were justified in seeking private medical care and treatment as opposed to a public hospital on the following ground:

(a) that there are insufficient resources in government hospitals to cater for Thaqif's intensive rehabilitation needs, resulting in long waits, infrequent appointments, and a lack of continuity in treatment;

(b) the parents are unable to take Thaqif to government hospitals during office hours due to work commitments; and

(c) the standard of care and treatment received by Thaqif at government hospitals has been shown to be lower than the standard expected of such hospitals.

[118] The counsel for the defendants had contended that the plaintiff is entitled to claim only one-third of the private healthcare medical expenses actually incurred by the plaintiff on the ground that the medical treatments sought by the plaintiff at the private hospital were readily available at the government hospitals.

[119] On the issue of applicability of the 'one-third principle' as raised by the defendants, I find it germane to emphasise here that there is in fact no hard and fast rule regarding the application of the one-third rule and that the correct test of reasonableness should instead be applied in deciding whether the plaintiff is entitled to the full sum of private hospital medical expenses claimed as explained by the Court of Appeal in the case of *Muhammad Yassein Zuliskandar (a child suing through his father and next friend; Zuliskandar Md Pechor) v*

Kerajaan Malaysia & Ors [2019] 4 CLJ 289; [2019] 1 MLRA 566 where it was held as follows:

> [10] In this regard, we agree that in *Chai Yee Chong*, no such 'one-third principle' was set out. Indeed, as was pointed out in the case itself, no such principle is provided under any written law. It has only become a matter of practice through the adoption of case precedents. Instead, it was decided that the test of reasonableness should be applied in deciding whether the claimant is entitled to recover the full sum of the private healthcare medical expenses.
>
> [11] *This test of reasonableness was recently affirmed by the Federal Court in Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885 ('Inas Faiqah') where Abdull Hamid Embong FCJ, in speaking for the court, observed as follows (at p 15 (MLJ); pp 898–899 (CLJ)):
>
> > [36] In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judges was in line with the current practice on the strength of the decision in *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. In determining a claim for future medical treatment, be it at private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in *Gleneagles*, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres.
>
> [12] In other words, the test of reasonableness applies in two ways. First, the plaintiff must justify why he chooses treatment at a private hospital over a public hospital. Secondly, the plaintiff must show that the cost of treatment at a private hospital was reasonable. In determining whether it is, or was, reasonable or justifiable in resorting to treatment at a private hospital, there can be no fixed or inflexible rules simply because of the myriad of reasons or circumstances why treatment is sought or intended to be sought at a private hospital.
>
> ...
>
> [15] In the end, there can be no fixed rule. It really depends on the peculiar circumstances of each case. With the *Inas Faiqah* decision, a claim instituted now for medical expenses cannot be denied purely on the ground that the particular treatment was available at a government hospital. A holistic consideration of the question of reasonableness is imperative before any decision can be made on whether such claims for private medical expenses can be allowed (see also *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102; [2017] 3 CLJ 311).

[120] It is clear from the above authority that the plaintiff shall be entitled to the full sum of medical expenses claimed if the plaintiff can justify his choice of seeking medical treatment at the private hospital as opposed to the government hospital and that the medical expenses incurred was reasonable.

[121] After careful consideration, I do not think that sufficient reasons have been given to show that it was justified and reasonable for the plaintiff to be awarded the full sum of the hospital and medical expenses at the private hospital. It cannot be the case that a government hospital is unable to deal with cerebral palsy patients. And the inability to take the plaintiff to the hospital during office hours due to work commitments is to my mind an unreasonable excuse.

[122] It is thus in my considered view that the plaintiff ought not to be awarded the total sum of RM7,800 as claimed. This court also finds insufficient evidence to support the plaintiff's claim for the said sum. Having scrutinised all evidence as adduced before this court, it is in my considered view that the plaintiff was only able to prove expenses paid for the total sum of RM1,945.25 and this court finds it reasonable to award the plaintiff only one-third of the said sum.

Travelling expenses

[123] The plaintiff sought the total sum of RM23,205 as travelling expenses calculated at a monthly rate of RM273 per month. The plaintiff had again merely written down a sum with no sufficient particulars and throw it to the head of the court asking for the said sum to be awarded.

[124] There was no basis in which this court can rely on calculating the travelling expenses as incurred by the plaintiff. The plaintiff had failed to provide even the distance and the travel frequency at the material time. This court, however, takes cognisance of the necessity for the plaintiff's parents to travel to the hospital during the plaintiff's hospitalisation as well as the necessity for the plaintiff to attended specialist clinics, therapy sessions and medical clinics, as such, this court finds it reasonable to award the total sum of RM12,750 for the said travelling expenses.

Fees for medical report

[125] The sum of RM340 as claimed for the medical report is allowed.

Cost of pre-action discovery of medical records

[126] The first defendant had disclosed copies of plaintiff's medical records voluntarily, and as such was not liable to pay the damage under this heading. The third defendant, however, had refused to do so. The plaintiff therefore had to apply to the High Court for an order for pre-action discovery of his medical record from the third defendant.

[127] The plaintiff claimed for the total sum of RM7,420 as cost of pre-action discovery of medical records. However, evidence adduced show that only RM300 was expended in obtaining the said documents. This court, therefore, awards the plaintiff the total sum of RM300 only under this heading.

Cost of a caregiver/maid

[128] The assessment of the value of care cannot in my considered view be calculated with precision by applying a mathematical formula. As such, the court has a duty to consider all evidence in arriving at a figure which amounts to fair and adequate compensation in the circumstances of the case as a whole.

[129] From 6 October 2011 to 31 December 2013, the plaintiff was cared for by his grandparents during office hours and after that by his parents. In the circumstances of this case, I find that RM700 was a fair and reasonable amount to be awarded to the plaintiff considering that the grandparents only took care of the plaintiff during office hours. Therefore I allow the award of RM18,900 for the care of plaintiff at home.

[130] From 1 January 2014 onwards, the plaintiff's parents had engaged the service of a maid to care for the plaintiff. Based on the documentary evidence as adduced before this court, I find RM1,000 per month to be reasonable compensation for the cost of care for the plaintiff. In the circumstances, this court award the plaintiff the total sum of RM84,000 for maid services engaged.

[131] Accordingly, the total sum allowed for the plaintiff's cost of care is RM102,900.

Cost of physiotherapy

[132] In view of the availability of such treatment at HSNZ and no reasonable explanation as to why the plaintiff had opted for treatment at a private hospital, this court finds it reasonable to award one-third of the sum claimed for the total sum of RM18,133.

Supporting equipment

[133] The court finds it reasonable to award the full sum claimed for the supporting equipment for the total sum of RM9,141.

Personal care items

[134] The court finds it reasonable to award the sum amounting to RM35,000 for the costs of personal care items.

Special food

[135] The court finds it reasonable to award the sum amounting to RM40,635 for the costs of personal care items.

Medicinal oils

[136] Due to the lack of documentary evidence to support the full claim, this court finds it reasonable to award the total sum of RM2,268.35 for medicinal oils purchased by parents for the plaintiff.

GENERAL DAMAGES

[137] Based on my findings above on the defendants' liability, it is in my considered view that the plaintiff had successfully proven his case to the satisfaction of this court. Due to the defendants' negligence, the plaintiff had suffered irreversible damage and is now a cerebral palsy patient wholly dependent on others for his everyday needs.

[138] This court was guided by the Court of Appeal case of *Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal* [2013] 4 MLJ 785; [2013] 8 CLJ 449 where the Court of Appeal had affirmed the sum of RM350,000 awarded as general damages for cerebral palsy patient with life expectancy of 49 years.

[139] The Court of Appeal had in a more recent decision in the case of *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102; [2017] 3 CLJ 311 having estimated the life expectancy of cerebral palsy patient to be 50 years awarded the sum of RM385,000 as general damages for loss of pain and suffering and loss of amenities.

[140] Having considered the factual matrix of the case and the law and for the foregoing reasons above, this court awards the plaintiff a global sum of RM350,000 for the pain and suffering and the loss of amenities of life suffered by the plaintiff caused by the defendants' negligence.

FUTURE DAMAGES

Life expectancy and the multiplier

[141] Dr Kavitha had given the plaintiff an average life expectancy of 33 years whilst Dr Rahimah had estimated the plaintiff to have a 43% chance of surviving to the age of 30. Dr Rahimah was willing to add a further five years to the plaintiff's life expectancy on account of 'favourable economics'.

[142] Having considered the contention and evidence and opinion advanced by the experts, it is in my considered view that 33 years is a reasonable postulation to make in respect of the plaintiff's life expectancy. The multiplier as applied by this court based on expert opinion on life expectancy is as follows:

Life expectancy	33
Less current age	(10)
Less 30% for contingencies	(6.9)
Multiplier	16.1

Based on the above calculation, the multiplier to be adopted by this court was 16 years in the particular circumstances and with due regard to the plaintiff's condition in this case.

[143] Having carefully scrutinised parties submission in the instant case and having compared the expert opinion in assessing the future damages to be awarded to the plaintiff, having at the forefront of my mind the welfare of the plaintiff and taking the rate of inflation into account, the court finds it reasonable to award the plaintiff as follows:

Equipment, appliances, etc

No	Item	Estimated cost (RM)	Estimated life span	Total cost for multiplier of 16 (RM)
1	Cardiac table	500	yearly	8,000
2	Home renovation for accessibility and bathing	20,000	once	20,000

3	Hi-lo double fowler hospital bed with electric and manual option	6,000	10 years	12,000
4	Orthotic devices	3,000	yearly	48,000
5	Standing frame	10,000	5 years	30,000
6	Home rehab equipments	5,000	5 years	15,000
7	Cerebal palsy wheelchair	5,000	5 years	15,000
8	Modified MPV	180,000	10 years	360,000
9	Nebuliser	400	5 years	1,200
10	Padded reclining commode chair	1,000	5 years	3,000
11	Consumables	1,000	monthly	192,000
12	PEG tube replacement	500	yearly	8,000
13	Nutritional care	400	monthly	76,800
14	Electric hoist/portable hoist	8,000	10 years	16,000
15	Positioning wedges	500	yearly	8,000
16	Customised seating system	4,000	3 years	20,000
17	Portable ramps	5,000	5 years	15,000
18	Pulse oxymeter with alarm	300	5 years	900

[144] On the costs claimed for medical, therapy and other services necessary in the rehabilitation of the plaintiff, this court agrees with the defendants that such services are available at HSNZ. The plaintiff had failed to advance any reasonable explanation regarding the necessity to obtain such services at private healthcare.

[145] This court further agrees with the defendants' suggestion to award the cost of RM35,000 for the plaintiff to undergo the surgical stabilization of the spine and hip surgery.

[146] The plaintiff had claimed for the costs of two maids for the total sum of RM1,276,200. This court agrees that a full-time maid is necessary to assist with the care of the plaintiff as the plaintiff's condition requires round-the-clock care and supervision and it would be impossible for the working parents to care for the plaintiff themselves without the assistance of a maid. This court, however, finds that one maid is sufficient to provide the assistance required in caring for the plaintiff.

[147] I am also of the considered view that the additional cost of accommodation, utilities, meals and consumables for the sum of RM800 cannot be awarded as the maid hired will have to reside and live in the same

dwelling as the plaintiff (see the case of *Muhammad Yassein Zuliskandar (a child suing through his father and next friend; Zuliskandar Md Pechor) v Kerajaan Malaysia & Ors* [2019] 4 CLJ 289; [2019] 1 MLRA 566). This court awards the plaintiff the total sum of RM384,000 (RM2,000 per month) for the cost of hiring a maid.

[148] The plaintiff is also claiming for the cost of accommodation and living expenses after the plaintiff reaches the age of 18 years. It was submitted by the plaintiff that, factoring in inflation, the monthly cost of living at the time the plaintiff attained age 18 would be about RM3,000 per month.

[149] Upon giving some consideration on the plaintiff's submission, I dismissed the claim on the ground of duplicity as some of the cost of living for the plaintiff in future have been covered far exceeding his majority age of 18 years. Living expenses like nutritious food, milk, personal care, housing and other needs have been accounted for. Furthermore, s 28A(2)(i) of the Civil Law Act 1956 applies. Since the plaintiff was not an income earner before the negligence occurred, the plaintiff was thus not entitled to such.

AGGRAVATED DAMAGES

[150] The plaintiff had sought for additional compensation of aggravated damages for the total sum of RM500,000. The Federal Court had recently in the case of *Dr Hari Krishnan* confirmed that aggravated damages in addition to general damages can be awarded in the case of medical negligence.

[151] Based on the evidence adduced before this court, it is in my considered view that the third defendant's suppression of the plaintiff's medical records had caused the plaintiff to incur avoidable costs and expenses and time in filing the pre-action discovery.

[152] Furthermore, despite the overwhelming evidence of negligence on the part of the defendants, the defendants refused to admit liability but instead filed a defence denying liability. In my view, such conducts by the defendants would have caused unnecessary distresss to the plaintiff and/or his family particularly his parents.

[153] Accordingly, in light of the conduct of the defendants in the present action, I find that it is reasonable and appropriate for this court to award the plaintiff aggravated damages in the sum of RM100,000.

INTEREST

[154] Interest on the various head of damages are awarded as follows:

(a) interest at 4%pa on special damages from 5 September 2011 to the date of judgment;

(b) interest at 8%pa on pre-trial damages and general damages for pain and suffering and loss of amenities of life from date of service of writ to the date of judgment; and

(c) interest at 5%pa on the judgment sum from the date of judgment to date of full payment.

CONCLUSION

[155] In coming to a decision, this court has carefully weighed both the oral and documentary evidence adduced by all parties, scrutinized all the documents tendered and relied upon by the parties and considered the written submissions as well as the authorities filed by them. In considering the evidence as a whole especially the evidence of all the plaintiff's witnesses vis a vis the pleadings, and that of the defendant, it is my considered view that the plaintiff had proved his pleaded case, on the balance of probabilities, to the satisfaction of this court.

[156] For the foregoing reasons above, this court, therefore, ordered accordingly. All the awards to the plaintiff are subject to a deduction of 30% for contributory negligence on the total award. Costs of RM75,000 to be paid by the first and second defendants to the plaintiff and costs of RM150,000 to be paid by the third to 12th defendants (except the eighth defendant) to the plaintiff.

Order accordingly.

Reported by Ashok Kumar